TUAN HAJI AHMED ABDUL RAHMAN

v.

ARAB-MALAYSIAN FINANCE BERHAD

FEDERAL COURT, KUALA LUMPUR
TAN SRI DATO' HJ. ANUAR ZAINAL ABIDIN CJ (MALAYA)
TAN SRI DATO' EDGAR JOSEPH JR. FCJ
DATO' WAN ADNAN ISMAIL FCJ
[CIVIL APPEAL NO. 02-226-94]
15 DECEMBER 1995

PRACTICE & PROCEDURE: *Irregular judgment - Legality - Expressions used in judgment unclear in purport - Liability under judgment uncertain - Whether uncertainty so serious as to render judgment a nullity.*

PRACTICE & PROCEDURE: *Irregular judgment - Discretion of Court to set aside - Pre-requisites for exercise of discretion - Delay to set aside judgment - Whether necessarily fatal - Whether Court retains discretion to set aside an irregular judgment despite a long delay.*

PRACTICE & PROCEDURE: *Appeal - Appeal to Judge in Chambers from decision of Registrar - Whether by way of actual re-hearing - Whether Judge to treat matter as though it came before him for the first time.*

A judgment in default of appearance had been entered against the appellant by the High Court on 8 July 1988, ordering the defendant to pay the plaintiff *"the said sum of RM4,923,242.69 at 31 March 1988 together with interest thereon at 1% above the Prescribed Rate which is the sum of the Margin (as therein defined) and the Base Lending Rate of the plaintiff on a daily rests from 1 April 1988 till the date of full realisation"*. Some three years later, on 4 December 1991, the appellant applied to set aside the judgment on the ground that it had been entered without leave of Court, and hence, had contravened O. 83 r. 4(1) of the Rules of the High Court. The Registrar ruled for the appellant, set aside the judgment and gave leave to the appellant to defend the action.

On appeal to the Judge in Chambers, Counsel for the appellant had again impugned the validity of the default judgment, but this time on the ground that the default judgment had suffered from serious ambigiuity such that there was uncertainty as to the nature and extent of the appellant's liability thereunder. The learned Judge, however, declined to consider the contention on the ground that the issue had not been raised before the Registrar, and therefore, was a new point which it was not open to the appellant to take. The Judge ruled that although the words "Margin", "Prescribed Rate" and "Base Lending Rate" had not been defined in the judgment, that defect was cured by reading the judgment with the loan agreement wherein the words were defined. The Judge also took the view that the default judgment had transformed into a consent judgment and that, unless the appellant could bring the matter more or less within the terms on which a consent judgment can be set aside he would not succeed in his application. In the circumstances, the learned Judge restored the default judgment, and in the process had it amended to accord with the respondent's prayers, though no such application came before him for disposal. The appellant appealed and before the Federal Court the primary issues that arose were:

1. Whether the default judgment was riddled with uncertainty, serious enough as to render it an irregular judgment.

2. Whether the three-year delay in making the application to set aside the judgment was fatal to the appellant's application.

Held:

Per Edgar Joseph Jr. FCJ (delivering the judgment of the Court):

[1] The general rule is that when it is clearly demonstrated to the satisfaction of the Court that a judgment has not been regularly obtained, the defendant is entitled to have it set aside *ex debito justitiae*. However, the application to set aside such judgment should be made with reasonable promptitude and before the defendant has taken any fresh step after becoming aware of the irregularity.

[2] The learned Judge, in amending the default judgment, and in consequently deleting the words "daily rests basis" from the judgment was deciding on an application which was not before him for disposal. Clearly, there had been procedural impropriety in the decision making process, as neither Counsel has had the opportunity of being heard. On this ground alone, his judgment could not stand.

[3] Appeals from decisions of the Registrar are by way of an actual rehearing and the Judge must treat the matter as though it came before him for the first time. The Judge was therefore wrong in refusing to consider the contention of the appellant that the default judgment was invalid.

[4] The default judgment had not been entered in the appropriate form bearing in mind that it was for a liquidated sum. In so far as contractual interest at a fixed or constant rate is concerned, the judgment does not specify sufficiently the contract relied on for the claim for interest, the meaning of the the expressions "Margin", "Prescribed Rate" and "Base Lending Rate" referred to therein, the date from which contractual interest is owing, the precise rate of interest fixed by the contract, the amount of contractual interest owing at the date of the issue of the writ, as well as the total amount of contractual interest owing from that date to judgment. In so far as the default judgment included an element of contractual interest at a fluctuating rate is concerned, it does not sufficiently specify or at all, the rate of interest, the period and the amount of the interest and the total amount of interest payable to the date of judgment, and also the total amount of interest payable. The judgment was riddled with uncertainties serious enough as to render it an irregular judgment.

[5] The reference to the loan agreement for the purpose of resolving the ambiguities in the default judgment herein in favour of the respondent was flawed. Assuming that the learned Judge was entitled to advert to such reference, the reference would still have not resolved the ambiguities in the judgment in favour of the respondent, for, the appellant would still be perplexed as to the amount of interest he would have to pay, and so, he would be perplexed as to the total sum he would have to pay under that judgment in order to avoid enforcement proceedings. This must be the case as the default judgment included an element of contractual interest at a fluctuating rate and when such interest was to run depended upon the absolute discretion of the respondent, and so was clearly uncertain.

[6] Delay alone would not necessarily be fatal to the appellant's case. It is clear law that the Court still retains a discretion to set aside an irregular judgment if no one has suffered prejudice by reason of the delay, or, where such prejudice has been sustained, it can be met by an appropriate order as to costs, or when the circumstances were such that to let the judgment stand would constitute oppression. Indeed, under its inherent jurisdiction to prevent an abuse of its proceedings, the Court has power to set aside a judgment in default, even when the defendant's application is out of time, if the particular circumstances of the case require the intervention of the Court.

[7] Having regard to the principles on when the Court can condone delay on the part of a defendant, the appellant's delay herein was not fatal to his application, especially when the default judgment, by reason of uncertainty, was a nullity, and the amendment made by the Judge to it by deleting the words "on monthly rests", did not cure that defect.

[8] There is a sharp distinction in law between a "consent order" and an order to which a party is "not objecting". Given the circumstances of the present case, the default judgment here was not a consent judgment, as it was never even alleged by the respondent that there has been any compromise or arrangement between the parties pursuant to which the default judgment has been entered. The Judge was therefore wrong when he said, with regard to the default judgment, that "it is as if a consent judgment had been entered and unless the defendant could bring the matter more or less within the terms in which a consent judgment can be set aside, he would not succeed in his application to have such a judgment set aside".

[Appeal allowed. Order of Senior Assistant Registrar restored. Appellant given liberty to defend action].

***[Bahasa Malaysia** Translation of Headnotes]*

***AMALAN & PROSEDUR:** Penghakiman luar aturan - Kesahan - Maksud ungkapan-ungkapan yang digunakan dalam penghakiman tidak jelas - Tanggungan di bawah penghakiman tidak jelas - Samada ketidak-pastian terlalu serius hingga menjadikan penghakiman batal.*

***AMALAN & PROSEDUR:** Penghakiman luar aturan - Budibicara Mahkamah untuk mengenepikan - Prasyarat bagi pelaksanaan budibicara - Kelewatan untuk mengenepikan penghakiman - Samada secara pentingnya memudaratkan - Samada Mahkamah mengekalkan budibicara untuk mengenepikan suatu penghakiman luar aturan walaupun terdapat kelewatan yang melampau.*

***AMALAN & PROSEDUR:** Rayuan - Rayuan kepada Hakim dalam kamar dari keputusan Pendaftar - Samada sebenarnya melalui cara perbicaraan semula - Samada Hakim harus mengambil perkara itu seolah-olah ianya dikemukakan di hadapannya buat kali yang pertama.*

Satu penghakiman ingkar kehadiran telah dimasukkan terhadap perayu oleh Mahkamah Tinggi pada 8 Julai 1988, memerintah defendan supaya membayar plaintif "*the said sum of RM4,923,242.69 at 31 March 1988 together with interest thereon at 1% above the Prescribed Rate which is the sum of the Margin (as therein defined) and the Base Lending Rate of the plaintiff on a daily rests from 1 April 1988 till date of full realisation*" (jumlah tersebut sebanyak RM4,923,242.69 pada 31 Mac 1988 bersama-sama faedah ke atasnya pada kadar 1% melebihi Kadar Yang Di tentukan yang mana merupakan jumlah Margin (sepertimana

yang ditakrifkan di dalamnya) dan Kadar Pinjaman Asas plaintif pada kiraan harian daripada 1 April 1988 sehingga tarikh penyelesaian yang sepenuhnya). Lebihkurang tiga tahun kemudiannya, pada 4 Disember 1991, perayu telah memohon untuk mengenepikan penghakiman tersebut atas alasan ianya telah dimasuki tanpa kebenaran Mahkamah, dan oleh itu, telah melanggari A. 83 k. 4(l) Kaedah-kaedah Mahkamah Tinggi. Pendaftar telah memutuskan bagi perayu, mengenepikan penghakiman dan memberikan kebenaran kepada perayu untuk membela tindakan tersebut.

Atas rayuan kepada Hakim dalam kamar, Peguam bagi pihak perayu telah sekali lagi meragui keesahan penghakiman ingkar tersebut, tetapi kali ini atas alasan bahawa penghakiman ingkar tersebut telah mengalami ketaksaan yang serius hinggakan terdapatnya ketakpastian berhubung dengan sifat had tanggungan perayu di bawahnya. Hakim yang bijaksana, walaubagaimanapun, tidak mahu menimbangkan penegesan tersebut atas alasan bahawa isu itu telah tidak dibangkitkan di hadapan Pendaftar, dan oleh itu, merupakan suatu perkara yang baru yang mana tidak terbuka kepada perayu untuk membangkitkannya. Hakim telah memutuskan bahawa walaupun perkataan-perkataan "Margin", "Prescribed Rate" dan "Base Lending Rate" ("Margin", "Kadar Yang Ditentukan" dan "Kadar Pinjaman Asas") telah tidak ditakrifkan dalam penghakiman, kecacatan tersebut telah dipulihkan dengan membaca penghakiman bersama-sama dengan perjanjian pinjaman di dalam mana perkataan-perkataan tersebut telah ditakrifkan. Hakim juga berpendapat bahawa penghakiman ingkar tersebut telah bertukar menjadi penghakiman persetujuan dan bahawa, kecuali perayu dapat membawa perkara itu lebihkurang dalam lingkungan terma-terma di atas mana sesuatu penghakiman persetujuan boleh diketepikan, beliau tidak akan berjaya di dalam permohonannya. Dalam keadaan yang sedemikian, Hakim yang bijaksana telah menghidupkan semula penghakiman ingkar tersebut, dan dalam proses tersebut telah memindanya untuk menjadikannya bersesuaian dengan pohonan-pohonan responden, walaupun tidak terdapat permohonan yang sedemikian yang tiba di hadapannya untuk penyelesaian. Perayu telah merayu dan di hadapan Mahkamah Persekutuan isu-isu utama yang berbangkit adalah:

1. Samada penghakiman ingkar tersebut penuh dengan ketidakpastian, cukup serius sehingga menjadikannya suatu penghakiman yang luar aturan.

2. Samada kelewatan selama 3 tahun dalam membuat permohonan untuk mengenepikan penghakiman tersebut adalah memudaratkan permohonan perayu.

Diputuskan:

Oleh Edgar Joseph Jr. HMP (menyampaikan penghakiman Mahkamah):

[1] Kaedah umumnya adalah bahawa bilamana ianya ditunjukkan dengan jelas sehingga memuaskan Mahkamah bahawa sesuatu penghakiman telah tidak diperolehi menurut aturannya, defendan adalah berhak untuk mengenepikannya *ex debito justitiae*. Walaubagaimanapun, permohonan untuk mengenepikan penghakiman yang sedemikian seharusnya dibuat segera dan sebelum defendan mengambil apa-apa langkah baru selepas mengetahui tentang sifat luar aturannya.

[2] Hakim yang bijaksana dalam meminda penghakiman ingkar, dan seterusnya memotong perkataan-perkataan "daily rests basis" (pada kadar kiraan harian) daripada penghakiman tersebut telah membuat keputusan mengenai suatu permohonan yang tidak terdapat di hadapannya untuk penyelesaian. Jelas bahawa terdapatnya ketakwajaran prosedur dalam

proses membuat keputusan tersebut, kerana Peguam dari kedua-dua pihak tidak mempunyai peluang untuk didengar. Atas alasan ini semata-mata, penghakimannya tidak boleh kekal.

[3] Rayuan daripada keputusan-keputusan Pendaftar adalah sebenarnya melalui suatu perbicaraan semula dan Hakim haruslah mengambil perkara tersebut seolah-olah ianya tiba di hadapan beliau buat kali yang pertamanya. Hakim tersebut adalah dengan itu salah dalam enggan untuk menimbangkan penegasaan perayu bahawa penghakiman ingkar itu adalah tak sah.

[4] Penghakiman ingkar tersebut telah tidak dimasukkan menurut cara yang wajar memandangkan bahawa ianya adalah untuk jumlah tertentu. Sejauhmana faedah kontraktual pada kadar yang tetap atau kekal berkaitan, penghakiman tersebut tidak menentukan secukupnya kontrak yang ianya bergantung bagi mendapatkan tuntutan faedah, maksud ungkapan-ungkapan "Margin", "Prescribed Rate" dan "Base Lending Rate" yang dirujuk di dalamnya, tarikh dari mana faedah kontraktual terhutang, kadar faedah tertentu yang ditetapkan oleh kontrak tersebut, jumlah faedah kontraktual terhutang pada tarikh pengeluaran writ, dan juga jumlah penuh faedah kontraktual daripada tarikh tersebut sehingga penghakiman. Sejauhmana penghakiman ingkar termasuk unsur faedah kontraktual pada kadar turun naik adalah berkaitan, ianya tidak dengan secukupnya menentukan atau apa pun, kadar faedah, tempoh dan jumlah faedah dan jumlah penuh faedah yang kena dibayar sehingga tarikh penghakiman, dan juga jumlah penuh faedah yang kena dibayar. Penghakiman tersebut penuh dengan ketakpastian yang serius sehingga menjadikannya suatu penghakiman yang luar aturan.

[5] Rujukan kepada perjanjian pinjaman bagi tujuan memutuskan ketaksaan-ketaksaan dalam penghakiman ingkar di sini memihak kepada responden adalah tidak sempurna. Menganggapkan bahawa Hakim yang bijaksana berhak untuk merujuk kepada rujukan yang sedemikian, rujukan tersebut masih tidak dapat memutuskan ketaksaan-ketaksaan dalam penghakiman tersebut bagi responden kerana, perayu tersebut akan masih terasa bingung berhubung dengan jumlah faedah yang beliau mungkin kena bayar, dan yang demikian, beliau akan berasa bingung mengenai jumlah faedah yang beliau akan kena bayar di bawah penghakiman tersebut bagi mengelakkan prosiding-prosiding penguatkuasaan. Inilah seharusnya keadaannya kerana penghakiman ingkar tersebut termasuk unsur faedah kontraktual pada kadar yang turun naik dan bila faedah yang sedemikian harus dimulakan terpulang kepada budibicara mutlak responden, dan dengan yang demikian adalah jelas tidak pasti.

[6] Kelewatan semata-mata tidak secara pentingnya memudaratkan kes perayu. Ianya jelas di sisi undang-undang bahawa Mahkamah masih mempunyai budibicara untuk mengenepikan sesuatu penghakiman di luar aturan jika tidak seorang pun yang mengalami kemudaratan disebabkan oleh kelewatan tersebut, atau, di mana kemudaratan yang sedemikian telah dikekalkan, ianya boleh diselesaikan oleh suatu perintah yang bersesuaian bagi kos, atau di mana keadaan sedemikian hinggakan untuk membenarkan penghakiman itu kekal akan membentuk satu penindasan. Sesungguhnya, di bawah bidangkuasanya yang sedia ada untuk menghalang suatu penyalahgunaan prosidingnya, Mahkamah mempunyai kuasa untuk mengenepikan penghakiman ingkar, walaupun permohonan defendan di luar masa yang dihadkan, jika keadaan khusus kes tersebut memerlukan pencelahan Mahkamah.

[7] Menimbangkan prinsip mengenai bila Mahkamah boleh memaafkan kelewatan di pihak defendan, kelewatan perayu di sini tidak memudaratkan permohonannya, khususnya bilamana penghakiman ingkar tersebut, disebabkan ketidak-pastian, adalah suatu pembatalan, dan pindaan yang dibuat oleh Hakim kepadanya dengan memotong perkataan-perkataan "on monthly rests" (dengan kiraan bulanan), tidak memperbaiki kecacatan itu.

[8] Terdapat perbezaan yang ketara di sisi undang-undang antara "consent order" (perintah persetujuan) dan suatu perintah kepada mana sesuatu pihak "not objecting" (tidak membantah). Memandangkan keadaan kes semasa ini, penghakiman ingkar itu tidak merupakan penghakiman persetujuan, kerana ianya tidak pernah dikatakan oleh responden bahawa terdapatnya sebarang kompromi atau persetujuan antara pihak-pihak tersebut, selaras dengan yang mana penghakiman ingkar tersebut telah dimasuki. Hakim tersebut dengan itu salah bilamana beliau mengatakan, berhubung dengan penghakiman ingkar tersebut, bahawa "it is as if a consent judgment had been entered and unless the defendant could bring the matter more or less within the terms in which a consent judgment can be set aside, he would not succeed in his application to have such judgment set aside." (ianya seolah-olah penghakiman persetujuan telah dimasuki dan kecuali jika defendan dapat mengemukakan perkara tersebut dalam lingkungan terma-terma di dalam mana suatu penghakiman ingkar boleh diketepikan, beliau tidak akan berjaya dalam permohonannya untuk mengenepikan penghakiman tersebut.)

[Rayuan dibenarkan. Perintah Penolong Kanan Pendaftar dihidupkan semula. Perayu diberi kebebasan untuk membela tindakan].

Cases referred to:
Blundell v. Rimmer [1971] 1 AER 1072 ***(foll)***
Seloga Jaya Sdn. Bhd. v. Pembenaan Keng Ting (Sabah) Sdn. Bhd. [1994] 2 MLJ 97 ***(foll)***
Marsh v. Marsh [1945] AC 271 ***(refd)***
Wiseman v. Wiseman [1953] 1 AER 601 ***(refd)***
Tan Tin Swee v. Kangar Properties Sdn. Bhd [1990] 3 MLJ 167 ***(refd)***
Hughes v. Justin [1894] 1 QB 667 ***(refd)***
Muir v. Jenks [1913] 2 KB 412 ***(refd)***
Armitage v. Parsons [1908] 2 KB 410 ***(refd)***
Sanders v. Hamilton [1907] 96 LT 679 ***(refd)***
Malayan United Bank v. Mohammed Salleh bin Mohammed Yusoff & Ors. [1988] 3 MLJ 165 ***(refd)***
Attwood v. Chichester [1878] 3 QBD 772 ***(foll)***
Harley v. Samson [1914] 30 TLR 450 ***(foll)***
Beale v. McGregor [1886] 2 TLR 311 ***(foll)***
Bank Bumiputra Malaysia Bhd. v. Kredin Sdn. Bhd. & Anor. [1989] 1 MLJ 323
*Chandless-Chandless v. Nicholson [1942] 2 KB 321****(foll)***
Thorne v. Smith [1947] 1 AER 39 ***(foll)***
Siebe Gorman & Co. Ltd. v. Pneupac Ltd [1982] 1 All ER 377 ***(refd)***

Legislation referred to:
Rules of the High Court, 1980, O. 2 r. 2(i), O. 42 r. 13, O. 83, r. 4(1)

For the appellant - Su Tiang Joo (Alice Kweh with him); M/s. Cheah Teh & Su
For the respondent - Benjamin John Dawson; M/s. Nik Hussain & Partners

JUDGMENT

Edgar Joseph Jr. FCJ:

The short point which arose for decision in this appeal concerned the validity of a judgment in default of appearance dated 8 July 1988 which had been entered in the Commercial Division of the High Court, Kuala Lumpur, ("the default judgment") against the defendant, who was the appellant herein, at the instance of the plaintiff, who was the respondent to this appeal. The default judgment was in the following terms:

Judgment in Default of Appearance.

> No appearance having been entered by the defendant. IT IS THIS DAY ADJUDGED that the said defendant do pay to the plaintiff the said sum of RM4,923,242.69 at 31 March 1988 together with interest thereon at 1% above the Prescribed Rate which is the sum of the Margin (as therein defined) and the Base Lending Rate of the plaintiff on a daily rests from 1 April 1988 till the date of full realisation and costs on a solicitors and client basis to be taxed.
>
> Dated 8 July 1988.
>
> Sgd.
>
> The Senior Assistant Registrar
> High Court, Kuala Lumpur.

The appellant then caused to be filed an application by way of summons in chambers dated 4 December 1991, to set aside the default judgment on the ground that it was not regularly obtained.

It is elementary that an irregular judgment is one which has been enterd otherwise than in strict compliance with the rules or some statute or is entered as a result of some impropriety which is considered to be so serious as to render the proceedings a nullity.

The general rule is that when it is clearly demonstrated to the satisfaction of the Court that a judgment has not been regularly obtained, the defendant is entitled to have it set aside *ex debito justitiae*, that is to say, irrespective of the merits and without terms. Having said that it should be added that the application to set aside such a judgment should be made (a) with reasonable promptitude, in other words within a reasonable time and (b) before the defendant has taken any fresh step after becoming aware of the irregularity. (See O. 2, r. 2(i) of the Rules of the High Court, 1980.)

The appellant's application to set aside the default judgment came on for hearing before the Senior Assistant Registrar on 3 January 1991, when the only issue argued by way of a preliminary point of law was whether the default judgment had been entered in contravention of O. 83, r. 4(1) of the Rules of the High Court, which provides, that in a charge action begun by writ, judgment in default of appearance shall not be entered except with the leave of the Court.

At the conclusion of the arguments, the Senior Assistant Registrar reserved judgment and on 17 January 1992, he ruled in favour of the appellant and held that the default judgment had indeed been entered in contravention of O. 83, r. 4(l) the necessary leave to do so, not having been obtained, and he accordingly, set aside the same and gave unconditional leave to the appellant to defend the action.

The respondent then, by notice of appeal dated and issued by the Senior Assistant Registrar on 17 January 1992, appealed to the Judge in chambers who held that the action wherein the default judgment aforesaid had been obtained was not a charge action and therefore there could be no question of a contravention of O. 83, r. 4(l). Although in his application to the Senior Assistant Registrar to set aside the default judgment the appellant had relied upon various other grounds to do so, the learned Judge took it upon himself to hear the application at first instance, instead of remitting the same to the Senior Assistant Registrar for hearing on the merits.

We would add that before the learned Judge, Counsel for the appellant had impugned the validity of the default judgment on the ground that it was uncertain and unclear on the face of it and, in consequence, a nullity and/or an irregular judgment, but His Lordship declined to consider the contention on the ground that it had not been raised before the Senior Assistant Registrar and was therefore a new point which it was not open to the appellant to take.

With respect, in appeals to a Judge in chambers from the decision of a Registrar of the High Court, the Judge is not exercising appellate jurisdiction in the same sense as when he hears appeals from judgments, decisions or orders of the Subordinate Courts. Such appeals from decisions of the Registrar are by way of an actual re-hearing and the Judge treats the matter as though it comes before him for the first time. The Judge is therefore not confined to the points taken before the Registrar so that the rule about new points being not generally open to an Appellant to take on appeal does not apply. In support, we would refer to the following passage in the judgment of Payne J in *Blundell v. Rimmer* [1971] 1 AER 1072 (1076):

> I understand that the arguments before me ranged over a wider ground than those advanced by the parties' solicitors to the district registrar, and it was contended by Counsel for the plaintiff that I was fettered by the proceedings before the district registrar and confined to the arguments which were presented to him; that no point could be raised before me which was not raised below. It is, I think, clear on authority that the appeal from the district registrar is a rehearing of the application and I am entitled to treat the matter as though it comes before me for the first time; moreover, that I am not fettered by the previous exercise of the district registrar's discretion, although I should, of course, give to it the weight which it deserves. Authority can be found for this proposition in the speech of Lord Atkin in *Evans v. Bartlam* and in the notes in The Supreme Court Practice 1970 at p. 759 para 58/1/2, p. 762 para 58/4/1, under RSC O. 58 rr. 1 and 4.

In *Seloga Jaya Sdn. Bhd. v. Pembenaan Keng Ting (Sabah) Sdn. Bhd.*, [1994] 2 MLJ 97 at 106, the Supreme Court, had occasion to refer to the above passage in the judgment of Payne J, with approval.

The Judge was therefore wrong in refusing to consider the contention of the appellant that the default judgment was invalid. We must therefore direct our attention to this contention.

The appellant's complaint was that the "Prescribed Rate of Interest" although mentioned in the default judgment is not defined therein and hence a borrower in his position would not be able to ascertain for himself the amount which he is legally liable to pay if he is to avoid proceedings for enforcement of the default judgment.

The case of *Marsh v. Marsh* [1945] AC 271 at 284 PC shows that there is no decisive test for ascertaining what irregularities will result in a judgment being rendered void as distinct

from voidable, though it was there suggested by Lord Goddard when speaking for the board that one test which may be applied is whether the irregularity has caused a failure of natural justice. This is how His Lordship put it (at p. 284):

> A considerable number of cases were cited to their Lordships on the question as to what irregularities will render a judgment or order void or only voidable. *Anlaby v. Praetorius*, 20 QBD 764 and *Smurthwaite v. Hannay*, [1894] AC 494 are leading examples of the former, while *Fry v. Moore* 23 QBD 395 may be said to illustrate the latter. The practical difference between the two is that if the order is void the party whom it purports to affect can ignore it, and he who has obtained it will proceed thereon at his peril, while if it be voidable only the party affected must get it set aside. No Court has ever attempted to lay down a decisive test for distinguishing between the two classes of irregularities, nor will their Lordships attempt to do so here, beyond saying that one test that may be applied is to inquire whether the irregularity has caused a failure of natural justice.

However, in *Wiseman v. Wiseman* [1953] 1 AER 601, Denning LJ (as he then was) criticised the above *dictum* of Lord Goddard, in our view with considerable justification, when he said:

> It has been said that one test of the distinction between void and voidable is to inquire whether the transaction has caused a failure of natural justice: see *Marsh v. Marsh*, but I confess that I cannot follow this. If the defect is such as to make the transaction absolutely void, then void it is, no matter whether it causes a failure of natural justice or not. But if the effect of the defect is only to make the transaction voidable, then natural justice may well be taken into account by the Court in deciding whether it will in its discretion set the transaction aside or not, but it does not make the transaction automatically void.

Having said that there are some general observations which we should like to make regarding judgments which have not been regularly obtained. It has been said that a judgment would not be regularly obtained if it has been entered contrary to the rules, as for example, when it has been entered before the time limited for appearance has expired that is to say, prematurely, (see *Tan Tin Swee v. Kangar Properties Sdn. Bhd.* [1990] 3 MLJ 167) or for an excessive amount, that is to say, larger than is due (see e.g. *Hughes v. Justin* [1894] 1 QB 667. if, however, after realising that judgment has been entered for a larger sum than is due the plaintiff makes application to vary the judgment in default, the Court may rectify the error without setting aside the judgment. (See *Muir v. Jenks* [1913] 2 KB 412; *Armitage v. Parsons* [1908] 2 KB 410). Incidentally, *Sanders v. Hamilton* [1907] 96 LT 679 shows that application may be made by a plaintiff for amendment where judgment has been entered for an amount which is less than is due.

In *Armitage v. Parsons*, the plaintiff had obtained judgment in default of appearance and as a result of an error the judgment included a sum by way of costs which exceeded by a few shillings the costs properly payable. An application by the defendant to set aside the judgment in default on the ground of irregularity, was dismissed by the district registrar who instead amended the judgment by reducing the amount accordingly. On appeal to the Judge in chambers, the order of the district registrar was affirmed and on further appeal, the decisions below were upheld. The following passages in the judgment of Sir Gorell Barnes, President, merit reproduction:

(At p. 415):

> In my opinion, O. XXVIII r. 11, which provides that 'clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court or a Judge on motion or summons without an appeal' enables us to deal with this case so as to do substantial justice.

a And later (at p. 417):

> To my mind it is clear, as a matter of good sense and justice, that this was an accidental slip which under O. XXVIII r. 11 ought to be corrected, and that the whole judgment should not be set aside because of a mistake to the insignificant amount of 12s. I do not think that by so amending the judgment any of the rules or any principle of law is infringed. For these reasons I think that the appeal should be dismissed.

b

In *Malayan United Bank v. Mohammed Salleh bin Mohammed Yusoff & Ors.* [1988] 3 MLJ 165, the plaintiff had entered judgment which included post judgment interest for a sum in excess of the statutory rate of 8% p.a., but the High Court in refusing to vary the judgment, ruled that the principle in *Armitage v. Parsons* did not apply, because there had been no mistake or accidental slip which had occasioned the error.

c

To revert to the present case, the Judge recognised that the default judgment suffered from the defect that the words "Margin", "Prescribed Rate" and "Base Lending Rate", were nowhere defined therein, but considered that if the default judgment were read along with the loan agreement, the defects would be cured, since it was obvious that those words were defined in the loan agreement. The Judge then proceeded to dismiss the appellant's appeal,

d

to amend the default judgment in terms of the respondent's application, which prayed for the deletion of the words "daily rests basis" from the judgment, (even though this application was not before him for disposal and so neither Counsel was heard on the merits thereof) and he then proceeded to restore the default judgment, subject to these amendments. Clearly, there had been procedural impropriety in the decision making process, as neither Counsel

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had had the opportunity of being heard, and on this ground alone, his judgment could not stand.

But, on a further ground also, the appeal was bound to succeed. This bring us to the merits of the appeal.

f

It is obvious that the default judgment had not been entered in the appropriate form regard being had to the fact that it was for a liquidated sum.

In particular, insofar as **contractual interest at a fixed or constant rate** is concerned, the default judgment does not specify sufficiently or at all:

(a) the contract relied on for the claim for interest;

g

(b) the meaning of the expressions "Margin", "Prescribed Rate" and "Base Lending Rate" referred to therein;

(c) the date from which contractual interest is owing;

h

(d) the precise rate of interest fixed by the contract and the amount of contractual interest owing at the date of the issue of the writ;

(e) the precise rate of interest fixed by the contract and the total amount of contractual interest owing from the date of issue of the writ to judgment.

i

(We would interpolate, to remark, that it is advisable to show the amount of interest accruing daily, for ease of calculation. These particulars could conveniently be embodied in an appendix stapled to the default judgment.);

And, insofar as the default judgment included an element of contractual interest at a fluctuating rate is concerned, it does not specify sufficiently or at all:

(1) the rate of interest, the principal sum, the period and the amount of interest and the total amount of interest payable to the date of judgment.

(These particulars including the amount of interest accruing daily - could conveniently be embodied in an appendix stapled to the default judgment);

(2) the period of contractual interest as pleaded, save and except that it had to end at the date of judgment and not payment; and

(3) the total amount of interest payable.

To take the point further, we note that the learned Judge had referred to the loan agreement for the purpose of resolving the ambiguities in the default judgment with regard to the contractual interest payable thereunder in favour of the respondent. It would be wrong to assume that the learned Judge was entitled to do so, but assuming for the sake of argument only, that he was, it would be convenient and useful for a better understanding of this part of the case, if we reproduced the following provisions of the loan agreement:

"Margin"	in relation to the rate of interest payable to AMFB on drawdowns or, as the case may be, the loan, two and a half per cent (2½%) or such other rate as may at any time and from time totimehereafter be varied or substituted therefor by AMFB pursuantto s. 4.06.
"prescribed rate"	the rate of interest applicable to the loan as set out in s. 4.04(l) and includes any other rate as may at any time and from time to time hereafter be varied or substituted therefor by AMFB pursuant to s. 4.06.
"default rate"	the rate of interest payable in respect of any sum (whether principal, interest or otherwise) in arrears as set out in s. 4.07 and includes any other rate as may at any time and from time to time hereafter be varied or substituted therefor by AMFB pursuant to s. 4.07.
"Interest Payment Date"	any of the due dates for payment of interest charges as set out in s. 4.04(2)(b).

Section 4.04 **Interest**

(1) The borrower shall pay interest as from the first drawdown date on the drawdowns or, as the case may be, the loan from time to time outstanding and remaining unpaid at the rate per annum which is (a) the sum of the **Margin** and the **Base Lending Rate** of AMFB or (b) fourteen and a half per cent (141/2%) whichever of such rates is the higher (hereinafter referred to as "the **prescribed rate**" which expression shall include whenever and wherever the context so requires such other rate as may be varied or substituted therefor by AMFB pursuant to s. 4.06) with monthly rests and in accordance with the following provisions of this s. 4.04.

(2) Such interest at the prescribed rate shall (a) as from the first drawdown date until the final drawdown date be calculated on the daily outstanding balance of the drawdowns on the basis of a 365 day year (or 366 day year in the case of a leap year) and accrues from day to day and thereafter on the loan from time to time outstanding on the basis of a year of twelve 30 day months and (b) be payable by the borrower quarterly in arrears the first of such quarterly interest payments to be paid on the date corresponding numerically to the first drawdown date which falls in the third calendar month following next after the first drawdown date (or **such other date as may be stipulated by AMFB in its absolute discretion**) and the subsequent quarterly interest payments to be made on the same date of every third calendar month thereafter save that the last of such quarterly interest payments shall be paid together with the repayment of the loan or the balance thereof remaining unpaid on or prior to the repayment date.

(3) Whenever there is a change in its Base Lending Rate which would affect the rate of interest payable under this s. 4.04(l) AMFB shall promptly notify the borrower of the resulting change in such rate or interest payable in accordance with this s. 4.04 Base Lending Rate is effective.

(4) A certificate signed by any of the authorised officers of AMFB as to the prescribed rate of interest applicable, the manner of computation and amount of such interest payable at any time hereafter and the due dates for payment thereof shall be conclusive and binding on the borrower save for any manifest error.

Section 4.06 **Variation of interest rate**

Notwithstanding the Margin as set out in s. 2.01 or the provisions relating to the rate of interest as provided in s. 4.04(l) AMFB shall be entitled at any time and from time to time hereafter to **vary at its absolute discretion** the Margin or the rate of interest applicable to the loan by serving a notice in writing on the borrower of such its intention and such amended rate of interest shall be payable as from the date specified in the said notice. Service of such notice may be made by letter addressed to the borrower and sent by ordinary post or despatched by personal delivery to the borrower's address stated in s. 9.01 or the last known place of business or residence of the borrower and any such notice if sent by post shall be deemed to have been given or served two (2) days after the letter containing the same is put into the post office at Kuala Lumpur and in proving such giving or service it shall be sufficient to prove that the letter was properly addressed, stamped and put into a post office at Kuala Lumpur and notwithstanding the fact that such letter may be returned to the post office undelivered. (Emphasis added)

Section 4.07 **Damages for late payments**

In addition to and without prejudice to the rights powers and remedies herein conferred upon AMFB under Article VII and the memorandum of deposit if the borrower shall default in the payment of any sum (whether for principal or interest or commitment fee or otherwise) on the due date, the borrower shall pay to AMFB damages by way of interest at the rate of one fifteenth of one per cent (1/15%) per day on such sum or other moneys at that time in arrears calculated on the daily outstanding amount or

balance thereof with effect from the due date until the date of receipt of payment thereof by AMFB as well after as before any Court order or judgment. Any interest payable under this s. 4.07 which is not paid when due hereunder shall be added on to the overdue sum and bear interest accordingly. Notwithstanding such default rate AMFB shall be entitled at any time and from time to time hereafter to vary at its discretion such default rate by serving a notice in writing on the borrower of such its intention and such amended rate of default interest shall be applicable as from the date specified in the said notice. Service of such notice may be effected in the same manner as a notice for the variation of the interest rate under s. 4.06.

All references in the provisions aforesaid to "the borrower" and "AMFB" are, of course, to the appellant and the respondent, respectively.

Having regard to the provisions aforesaid, we consider - contrary to what the learned Judge held that resort to the loan agreement would still have not resolved the ambiguities in the default judgment in favour of the respondent, for the appellant would still be perplexed as to the amount of interest he would have to pay, and so he would be perplexed as to the total sum he would have to pay under the default judgment in order to avoid enforcement proceedings. We say so, because, in epitome, the default judgment, included an element of contractual interest at a fluctuating rate and when such interest was to run depended upon the abosolute discretion of the respondent, and so was clearly uncertain.

We were thus satisfied that the appellant had demonstrated that on the face of it, the default judgment, insofar as liability thereunder, for the payment of contractual interest was concerned, did not specify sufficiently or at all, the several matters to which we have referred and so was riddled with uncertainty, serious enough to render it an irregular judgment within the meaning of the authorities.

But the further hurdle which confronted the appellant and which he had to surmount was that there had been a spectacular delay of some three years before he bestirred himself into applying to the High Court to set aside the default judgment though admittedly he had not taken any fresh step after becoming aware of the irregularity.

Nevertheless, it is clear law that the Court still retains a discretion to set aside an irregular judgment despite long delay provided it is satisfied that:

(a) no one has suffered prejudice by reason of the defendant's delay;

(b) alternatively, where such prejudice has been sustained, it can be met by an appropriate order as to costs; or

(c) to let the judgment stand would constitute oppression. (See *Attwood v. Chichester* [1878] 3 QBD 772; *Harley v. Samson* [1914] 30 TLR 450.

We would add that under its inherent jurisdiction to prevent an abuse of its proceedings, the Court has power to set aside a judgment in default, despite the defendant's application being out of time if the particular circumstances of the case require the intervention of the Court. (See *Beale v. McGregor* [1886] 2 TLR 311).

By way of explanation for his delay in making his application to set aside the default judgment, the appellant had put forward the improbable explanation, which the Judge had no hesitation in dismissing as "ludicrous", that he had allowed judgment in default to go

against him because he could not afford to engage solicitors. Having regard to his business status and experience, we agreed with the Judge that this was a "ludicrous" explanation and was therefore unacceptable. But, delay, alone, having regard to the circumstances of the present case, was not necessarily fatal to the appellant's case.

In our view, having regard to the principles enunciated above, on when the Court can condone delay on the part of a defendant, the tardiness or the laches of the appellant in making his application, to set aside the default judgment, was not fatal to his application, especially since, in our view, the default judgment was by reason of uncertainty, **a nullity**, and the amendment made by the Judge to it by deleting the words "on monthly rests", did **not** cure that defect.

For the sake of completeness, we would add, that having regard to the chronology of events hereinbefore mentioned, the issue of delay in the present case has been determined without regard to O. 42 r. 13, which came into force only on l August 1993, by virtue of P.U.(A) 192, and which provides:

> 13. Where in these Rules provisions are made for the setting aside or varying of any order or judgment, a party intending to set aside or to vary such order or judgment must make his application to the Court and serve it on the party who has obtained the order or judgment within thirty days after the receipt of the order or judgment by him.

There is a final point to which we must now direct our attention.

The Judge held that where a defendant has deliberately allowed default judgment to be entered against him, it is as if consent judgment has been entered against him and that "unless he could bring the matter more or less within the terms on which a consent judgment can be set aside he would not succeed in his application to have such a judgment set aside." For this proposition the Judge cited his own judgment in *Bank Bumiputra Malaysia Bhd. v. Kredin Sdn. Bhd. & Anor*. [1989] 1 MLJ 323, wherein no authorities are cited.

Unfortunately, the Judge's attention was not directed to certain other authorities which show clearly that there is a sharp distinction in law between a "consent order" and an order to which a party is "not objecting".

In *Chandless-Chandless v. Nicholson* [1942] 2 KB 321 at 324 CA, Lord Greene MR said this:

> There is a great deal of difference between a consent order in the technical sense and an order which embodies provisions to which neither party objects. The mere fact that one side submits to an order does not make that order a consent order within the technical meaning of that expression.

In *Thorne v. Smith* [1947] 1 AER 39 at 44, Somervell LJ said this:

> The expression 'a consent order' may suggest some compromise or arrangement which might be inconsistent with the provisions of the Acts [Rent Restrictions Acts]. When the defendant is agreeing to submit to judgment because he is satisfied that the plaintiff can establish his right to an order under the Acts, it might be advisable to avoid the use of the word 'consent' which may have a wider meaning and cover cases where the 'consent' was the result of an arrangement which could not properly be made the basis of an order."

In *Siebe Gorman & Co. Ltd v. Pneupac Ltd* [1982] 1 All ER 377 at 380, Denning MR said:

> We have had a discussion about 'consent' orders'. It should be clearly understood by the profession that, when an order is expressed to be made 'by consent', it is ambiguous. There are two meanings to the words 'by consent'. That was observed by Lord Greene MR in *Chandless-Chandless v. Nicholson (supra)*. One meaning is this: the words 'by consent' may evidence a real contract between the parties. In such a case the Court will only interfere with such an order on the same grounds as it would with any other contract. The other meaning is this: the words 'by consent' may mean 'the parties hereto not objecting'. In such a case there is no real contract between the parties. The order can be altered or varied by the Court in the same circumstances as any other order that is made by the Court without the consent of the parties.'

In our view, given the circumstances of the present case, the default judgment was not a consent judgment, as it was never even alledged by the respondent that there has been any compromise or arrangement between the parties pursuant to which the default judgment had been entered. The Judge was therefore wrong when he said, with regard to the default judgment, that "it is as if a consent judgment had been entered and unless the defendant could bring the matter more or less within the terms in which a consent judgment can be set aside, he would not succeed in his application to have such a judgment set aside."

In all the circumstances, we allowed the appeal, with costs here and below, set aside the judgment of the learned Judge and, in consequences, also set aside the default judgment, restored the order of the Senior Assistant Registrar, though for wholly different reasons, and directed that the appellant be at liberty to defend the action which therefore would have to be heard on the merits. Deposit was ordered to be refunded to the appellant.

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